

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEQUAN LAWAIN TAYLOR,

Defendant-Appellant.

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UNPUBLISHED

August 12, 2014

No. 315853

Ingham Circuit Court

LC No. 12-000207-FC

Before: SAAD, P.J., and OWENS and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, being a felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 120 to 240 months' imprisonment for the assault conviction and 57 to 120 months' imprisonment for the felon-in-possession conviction, and a consecutive two-year prison term for the felony-firearm conviction. On appeal, defendant raises issues in an appellate brief prepared by appellate counsel and in a pro se supplemental brief pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. We affirm his convictions, but remand for resentencing in accordance with this opinion.

**I. SENTENCING GUIDELINES DEPARTURE**

In an appellate brief prepared by appellate counsel, defendant first argues that the trial court did not have a substantial and compelling reason for upwardly departing from the sentencing guidelines. Generally, a trial court must impose a sentence within the appropriate sentencing guidelines range, but may depart from that range if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). To be substantial and compelling, the reason must be objective and verifiable, i.e., "based on actions or occurrences external to the minds of those involved in the decision" and "capable of being confirmed." *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008); see also *People v Anderson*, 298 Mich App 178, 183; 825 NW2d 678 (2012). "The reasons for departure must also 'be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention.'" *Anderson*, 298 Mich App at 183, quoting *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). Because a substantial and

compelling reason only exists in exceptional cases, it is imperative that the trial court “justify *on the record* both the departure and the extent of the departure.” *Smith*, 482 Mich at 299, 313.

We review for clear error whether a particular factor supporting departure exists. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). We review de novo “[a] trial court’s determination that a factor is objective and verifiable,” and review for an abuse of discretion the court’s determination that the factors constitute substantial and compelling reasons to depart from the sentencing guidelines range. *Anderson*, 298 Mich App at 184; *People v Hardy*, 494 Mich 430, 438 n 17; 835 NW2d 340 (2013). A trial court’s factual determinations must be supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438.

In this case, the trial court chose to depart from the sentencing guidelines range of 34 to 100 months’ because it concluded that the guidelines did not take into account the nature of the offense given the fact that, in the court’s opinion, defendant planned to execute the victim and take his drugs, and “but for divine intervention,” the victim survived. The trial court relied on the fact that the guidelines did not “take into account the fact that an assault with intent to do great bodily harm doesn’t usually arise out of a circumstance of an attempted robbery, even though the jury didn’t convict [defendant] of that.” The court stated, “Oftentimes assault GBH arises out of a fight, or arises out of a, you know, maybe a lovers’ quarrel or something like that.”

Although the trial court is permitted to draw “inferences about defendant’s behavior from objective evidence,” *People v Petri*, 279 Mich App 407, 422; 760 NW2d 882 (2008), here, the trial court failed to articulate any objective and verifiable facts that it relied on to form its opinion that defendant intended to kill the victim. Rather, it merely stated its belief that defendant had acted with such intent. This was insufficient to sustain the departure. Without knowing what objective evidence, if any, the trial court relied on we cannot determine whether the trial court drew reasonable conclusions about defendant’s actual behavior to justify an upward departure from the guidelines. *Id.*; see also *People v Claypool*, 470 Mich 715, 718, 728-729; 684 NW2d 278 (2004) (determining that the defendant’s altered intent could be considered by a sentencing judge as a basis for downward departure if it is supported by objective and verifiable evidence).

Likewise, the trial court failed to provide objective and verifiable evidence to support its determination that assaults with intent to do great bodily harm do not normally arise out of attempted robberies. The trial court seems to have been speaking anecdotally, which is not external to the court’s mind.

Therefore, because the trial court’s substantial and compelling reasons for departure were not objective and verifiable, we remand for resentencing or for the trial court to articulate on the record substantial and compelling reasons for departing from the sentencing guidelines.<sup>1</sup>

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<sup>1</sup> We reject defendant’s contention that the trial court improperly ignored the jury’s acquittals. This Court has held that a trial court may consider, as an aggravating factor, the fact that a defendant’s actions constituted a more serious crime if that determination is supported by a

## II. STANDARD 4 BRIEF ISSUES

### A. SCORING OF OFFENSE VARIABLE 3

In his Standard 4 brief, defendant first raises the unpreserved argument that OV 3 was improperly scored because his coperpetrator did not qualify as a “victim.” Generally, appellate review of a scoring error is precluded where the defendant did not raise the issue at sentencing, in a motion for resentencing, or in a motion to remand. MCL 769.34. However, whereas here, defendant’s sentencing was outside the appropriate guidelines range, we may review this unpreserved argument for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

The trial court must score 100 points under OV 3 if “[a] victim was killed,” and the “death results from the commission of a crime and homicide is not the sentencing offense.” MCL 777.33(1)(a), (2)(b). Adopting this Court’s definition in *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003), our Supreme Court held that “victim” means “any person harmed by the criminal actions of the charged party,” and can include a coperpetrator. *People v Laidler*, 491 Mich 339, 348-349; 817 NW2d 517 (2012). More specifically, the Court stated that “the defendant must have been a factual cause of the victim’s death.” *Id.* at 349.

In this case, like in *Laidler*, the coperpetrator was killed while committing the charged offense with defendant. But for defendant’s commission of the crime, his coperpetrator would not have been killed, and thus, he was clearly harmed by defendant’s criminal actions. *Id.* at 350. Therefore, the coperpetrator was a “victim” pursuant to OV 3, and as such, the trial court properly assessed 100 points.

### B. ERRORS IN THE PLEADINGS

Defendant next argues that the victim was misidentified in the captions of the complaint, warrant, and information, and thus the trial court was divested of jurisdiction. Defendant is correct that the caption of the original and amended documents list the victim as Brandin Sanders, the deceased codefendant. In the body of the documents, however, the description of the charges against defendant clearly state that defendant committed the charged offense, assault with intent to murder,<sup>2</sup> against Weslie Bonds, who is the correct victim.<sup>3</sup> Further, at the preliminary examination it was made clear that the charged offense was made upon Bonds, and defendant was bound over for trial on that charge. It was also equally clear that defendant was preponderance of the evidence, even though defendant was not convicted of that crime. *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007).

<sup>2</sup> Defendant was convicted of the lesser-included offense of assault with intent to do great bodily harm less than murder.

<sup>3</sup> Originally, defendant was charged with open murder for the death of Sanders. As such, the captions of the original complaint, warrant, and information listed Sanders as the victim, but the description of the charges clearly specified which charges were for each victim. It appears that when the prosecution amended the documents to dismiss the open murder charge, it failed to remove Sanders as the victim in the caption.

on trial for the assault upon Bonds. Therefore, despite the error, the record reveals that defendant was still sufficiently apprised of the nature of the charges against him, Const 1963, art 1, § 20, that it enabled him to prepare his defense and would bar a subsequent charge for the same offense. *People v Mast*, 126 Mich App 658, 661-662; 337 NW2d 619 (1983). Moreover, the error was minor and did not result in a miscarriage of justice. See MCL 769.26 (stating that “no verdict shall be set aside or reversed or a new trial granted . . . for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice”); see also *In re Elliot*, 315 Mich 662; 24 NW2d 528 (1946) (stating that the trial court does not lose jurisdiction simply because an improper information is filed). Accordingly, the trial court was not divested of jurisdiction.

### C. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence to support his conviction for assault with intent to do great bodily harm. When examining whether there was sufficient evidence to support a conviction, the evidence is reviewed de novo in a light most favorable to the prosecution to determine “whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.” *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). Defendant does not actually challenge the sufficiency of the evidence presented, rather he argues that there was insufficient evidence to support his conviction of assault with intent to do great bodily harm because his trial counsel and the prosecution agreed that the evidence did not support this conviction. This argument is without merit.

Defendant misperceives the import of the statements made by the prosecution and defense counsel that he relies on to support his argument. With regard to the prosecution’s statement in its closing argument, “To find him guilty of a lesser assault, GBH, compromises the evidence of the facts of this case,” the prosecution did not contend that defendant was not guilty of assault with intent to do great bodily harm. Rather, it was arguing that defendant was guilty of the more serious crime of assault with intent to murder. Because assault with intent to do great bodily harm less than murder is a necessarily included lesser offense of assault with intent to murder, *People v Brown*, 267 Mich App 141, 150; 703 NW2d 230 (2005), the prosecution was not conceding that defendant was not guilty of the former.

With regard to defense counsel’s statement at sentencing, that he believed the jury was wrong to find defendant guilty of assault with intent to do great bodily harm less than murder, counsel was expressing his belief of what the evidence showed and was of course obligated to support defendant’s claim of innocence. His statements do not establish that there was insufficient evidence to sustain the conviction for assault with intent to do great bodily harm less than murder.

Nevertheless, we note that there was sufficient evidence presented to support defendant’s conviction of assault with intent to do great bodily harm less than murder, particularly where the evidence showed that defendant shot at the victim more than once at close range.

#### D. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also raises the unpreserved argument that his trial counsel was ineffective for failing to move for a directed verdict on the lesser-included offense of assault with intent to do great bodily harm less than murder. We review defendant's unpreserved claim of ineffective assistance of counsel for errors apparent on the record. *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To prevail on a claim of ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant has failed to prove that his trial counsel's performance was deficient. Defense counsel moved for a directed verdict on the count of assault with intent to murder, among others. Counsel could not, however, move for a directed verdict on the lesser-included offense of assault with intent to do great bodily harm less than murder, where defendant was not charged with that crime and it was not known at that point whether an instruction on the lesser-included offense would be submitted to the jury. Moreover, because the trial court denied the motion for a directed verdict for the greater offense, it follows that the trial court would have denied the motion for the lesser offense given that it is subsumed in the offense of assault with intent to murder. See *People v Brown*, 267 Mich App at 150. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). Therefore, we find that defendant was not denied the effective assistance of counsel.

#### E. JURY INSTRUCTIONS

Finally, defendant argues that the trial court failed to instruct the jury on the elements of assault with intent to do great bodily harm. This claim is simply untrue. After instructing the jury on the elements of assault with intent to murder, the trial court indeed instructed the jury on the elements of assault with intent to do great bodily harm. We find that these instructions were proper and that the jury was adequately instructed.

Affirmed as to convictions and remanded for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Kirsten Frank Kelly